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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1953.

No. [redacted] 95

FAYE B. BLACK, Administratrix of the Estate of Ernest B. Black, Deceased,

Petitioner,

vs.

HAROLD A. LOCKHART, Collector of Internal Revenue, Sixth District of Missouri,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

and

BRIEF IN SUPPORT OF THE PETITION

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PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks this Court's writ of *certiorari* to review a decision of the Court of Appeals for the Eighth Circuit in the important area of Federal income tax law that exists because of the rule that where a surviving partner distributes assets to the widow or other personal representative of a deceased partner in *liquidation* of the partnership's estate, such distribution (to the extent that it represents profits) is taxable to the estate of the partnership but where the surviving partner makes a disbursement in *purchase, as distinct from liquidation of the deceased partner's interest,* no part of such disbursement is

taxable to the widow or personal representative and the surviving partner is entitled to no deduction for the purposes of his own tax on account thereof. See *Bull* v. *U. S.*, 295 U. S. 247.

We demonstrate in the Reasons Relied On For Granting The Writ, *post*, that this field of Federal income tax law, of vast importance in the economics of the country, is in need of this Court's authoritative clarification, that the instant case is contrary to the *rationale* of *Bull* v. *U. S.*, 295 U. S. 247, and the decision in other circuits hereafter considered, and that this case is especially well adapted to afford the basis for the illumination that is necessary in this field.

Basis of Jurisdiction.

This Court has jurisdiction to review the judgment in question under Section 1254 of the Judicial Code (Title 28, U. S. C. A. sec. 1254).

Rehearing in this case was denied on February 25, 1954. The transcript of record has been filed, the docketing fee has been paid and this petition will be filed within ninety days from that date.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case, as the Court of Appeals correctly stated in its opinion,

> "grows out of the contention on the part of the government that the funds" which petitioner had "received in her representative capacity * * * in the course of winding up the affairs" of a partnership subsisting between one N. T. Veatch and the plaintiff's husband until the latter's death "were income to the estate" of the petitioner's husband, "whereas

she contends that they were a part of the purchase price paid her by the surviving partner."

The suit was one by the petitioner for the refund of taxes in the amount of only $20,791.57 for the period from July 4, 1949 to June 30, 1950, together with interest. But it is evident from the record that the decision in this case will determine the tax liability as between the petitioner widow and the decedent's surviving partner for many years to come because the unperformed engineering contracts upon which the petitioner will be receiving sums measured by profits under the articles of partnership giving rise to this case will amount in future years to hundreds of thousands of dollars.

All of the facts in this case are stipulated and nearly all of them are stated in the opinion of the Court of Appeals (Appendix I, pp. i to vii, *post.*)

Ernest B. Black, husband of the petitioner, and N. T. Veatch, Jr., were partners in the very profitable practice of construction engineering, rendering services to many "public corporations, including political subdivisions and utility companies throughout the United States."

Their partnership was dissolved by Black's death on July 4, 1949.

The petitioner has received and will for many years in the future continue to receive moneys from Veatch on account of the performance of contracts left unfulfilled at Black's death. These moneys have been and will be paid to her in accordance with the written articles of partnership subsisting between the partners.

Under the applicable authorities, notably this Court's decision in *Bull* v. *United States,* 295 U. S. 247, the Federal income tax question presented, which is similar in its generic aspects to questions that arise daily through-

out the nation in connection with the preparation and performance of partnership agreements and in connection with the preparation of returns of representatives of deceased partners and their surviving partners, is whether the disbursements by Veatch to the plaintiff are so far similar to disbursements that would be made "in liquidation" of the assets of a partnership dissolved by death under the general law of partnerships as to be tantamount to "liquidation" or are so markedly different from such distributions "in liquidation" as to amount to a "purchase" by the surviving partner of his deceased partner's interest, not in accomplishment of, but in lieu of ordinary "liquidation."

The articles of partnership, which appear in full text in the record (R. 4-12), themselves provided that in the event of the death, bankruptcy, insolvency or proceedings for liquidation by arrangement or composition with his creditors,

> "the partnership shall thereupon determine as to him, and he or his executors, administrators or assigns, as the case may be, shall *have no interest in common with the surviving or other partner or partners in the property of the partnership,* but shall be considered in equity as a *vendor* to the surviving partner of the share in the partnership of"

such deceased or otherwise retiring partner (R. 7). (Emphasis supplied.)

In brief, the articles provided further that the "method to be used in arriving at the amount due the retiring partner" or his representative "shall be based upon the value of that partner's interest as shown by the books of the partnership as of the effective date of the dissolution" (R. 7) with the following important exceptions:

The unfulfilled contracts held by the partnership should be carried "*to completion* so as to arrive at the exact amount of the total fees, and the total direct charges on said contracts, and the consequent loss of profit to be derived therefrom." Provisions were made for charging a fair proportion of overhead during completion, for apportioning overhead as between contracts extant on the day of dissolution and new contracts and for a "monthly salary" of the surviving partner "not to exceed the last agreed to between the partners as a monthly drawing account" (R. 7).

"Partnership insurance" should be taken into consideration but was negligible, "moneys received from charged off accounts, plan deposits forfeited, and other undisclosed assets" should, "when received, be divided equally between the parties" and "unsecured liabilities and losses on book accounts ascertained after the effective date" should be deducted.

The following provision is very important:

> "X. It is further understood that the surviving partner shall pay and discharge all the liabilities of the partnership, and shall hold the estate of the retired partner harmless from any liabilities thereon" (R. 9).

Equally important is paragraph IX. 1. (d):

> "(d) The retiring partner, his administrators, executors or assigns, shall have a lien of all of the assets belonging to the partnership at the effective date of dissolution. Such lien shall be in the nature of a chattel mortgage or pledge, and in case of default in the payments as in this contract provided, said lien may be foreclosed as a chattel mortgage." (R. 8).

The contract provided that all fixed assets would be charged at their value to the survivor (R. 11).

Also important is the provision in the articles of partnership to the effect that if the surviving partner himself dies before completion of contracts unfulfilled at the death of the partner first to die, the estate of the partner first dying shall participate in the performance of those contracts and the realization of the profits upon them. This is utterly inconsistent with the liquidation provided by the Uniform Partnership Law, which requires the estate of the partner last to die to complete liquidation and is wholly consistent with the enforcement of an unpaid vendor's equitable lien and charge upon assets sold but not paid for.

It will be noted that the distribution required by the contract differed from that contemplated by liquidation in accordance with the Missouri and general law of partnerships in the absence of contractual provisions in the following very important particulars:

1. Under the Uniform Partnership Act, in force in Missouri, a surviving partner has "no right to possess the partner's property for any but a partnership purpose" (Mo. Rev. Stats. 1949, Ch. 358, sec. 358, 230, Vol. II, p. 2756.) The contract, however, contains the direction "to charge fixed assets to surviving partner" (R. 11). Of course, if the assets are to be charged to him, he is to own them.

2. Under the general law of partnerships, the personal representative of a deceased partner owns an undivided interest in all partnership assets but has no "lien" or "chattel mortgage" on any of the assets to secure any indebtedness due him. Under the contract, however, the surviving partner owns all of the assets but the estate of the deceased partner is to have a "lien" in the nature of a "chattel mortgage" upon all of such assets.

3. Under the Missouri law and the general law of partnerships, while a surviving partner must of course apply the partner's assets first in payment of partnership debts, the surviving partner and the decedent's estate are jointly liable, with mutual rights of con-

tributions from each other, for all partnership debts in excess of the value of partnership assets. Under the instant contract, however, not only does the surviving partner individually assume and agree to pay all debts but, far from having any right of contribution from the deceased partner's estate, he must hold that estate harmless from the claims of any partnership creditors.

Finally, and perhaps most important of all, under the Missouri and general law of partnerships, the representative of the deceased partner, while he or she may insist upon a share of profits earned to date and doubtless upon a fair share of profits earned by the exploitation of partnership capital before distribution thereof, the representative of the deceased partner *would have no right to compel the surviving partner to perform contracts wholly unperformed at the date of death and surrender a full share of the profits thereof, less only a monthly salary to the surviving partner,* particularly where, as here, there was virtually no fixed capital except office furniture and the blue prints for the various projects. But this right is conferred upon the deceased partner's representative by the instant contract.

In short, under these Articles the estate of the deceased partner becomes a "vendor," the surviving partner becomes sole owner of the assets with an absolute liability not only to pay as consideration therefor a price measured by profits but to hold the estate of the deceased partner harmless and to fulfill all unexecuted controls.

Under the Uniform Partnership Act, in the absence of a contract such as this one, the survivor would *not* become the sole owner of the partnership estate, would *not* be personally and absolutely liable for any sum of money, would be entitled to look to, rather than be bound to hold harmless, the decedent's estate for contributions to losses and would in short, not acquire the partnership estate as his own.

Notwithstanding the signal differences between the "liquidation" contemplated by partnership law and the acquisition of sole control of assets in exchange for the contractual engagements so different from those implied by the law of partnerships, the Court of Appeals for the Eighth Circuit characterized the distributions as being merely in liquidation of the partnership estate and not proceeds of the deceased partner's interest in that estate.

The Court of Appeals relied heavily for its decision upon the decision of the Supreme Court of Missouri in *Veatch* v. *Black,* 363 Mo. 190, 250 S. W. (2d) 501, reprinted in full, Appendix II, *post,* which involved liquidation between the instant petitioner and her deceased husband's surviving partner. That opinion involved altercations between the petitioner and Veatch with respect to the adjusment of the affairs of the partnership. The Supreme Court of Missouri approved the trial court's finding "that the true intent of the agreement was to provide for a liquidation of the partnership by completing the uncompleted partnership contracts and not to affect the sale of the deceased partner's interest." But the opinion also declared:

> "The trial court did not undertake to determine any tax issue, and our review is restricted to the issues presented here involving the construction of the agreement by the trial court." (*Appendix II, post, p. viii*)

Petitioner deems the pronouncement of the Supreme Court of Missouri relevant on this application for *certiorari* only insofar as it reflects a fundamental error inherent in the reasoning and infecting the conclusion of the Court of Appeals in this case in that the Court of Appeals should have recognized that the question whether the disbursement by Veatch to the petitioner was a "liquidation" or a "purchase" of partnership assets is a Federal, not a State, question insofar as income tax problems are concerned.

The characterization of the transaction between petitioner and Veatch as "liquidation" or "sale" was of no moment or consequence under the Missouri law and, had it been of moment or consequence under that law, would not have been important in this income tax case.

The Court of Appeals also relied upon the decision of the Tax Court in *Veatch* v. *Commissioner of Internal Revenue,* Docket No. 38567, which held that the disbursements in question were immune to a tax as to Veach but visited a tax upon petitioner. But the *Veatch* case was decided upon conflicting evidence and the instant case was decided entirely upon stipulated facts. However, petitioner would also challenge the opinion of the Tax Court as well as of the Court of Appeals in its conclusions.

THE QUESTION PRESENTED.

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TERMS OF DISTRIBUTION CONTEMPLATED BY AND PERFORMED UNDER THE BLACK-VEATCH ARTICLES OF PARTNERSHIP SHOULD BE SO FAR ASSIMILATED TO A "LIQUIDATION" OF THE ESTATE OF A PARTNERSHIP DISSOLVED BY DEATH AND SO FAR DISTINGUISHED FROM THE "PURCHASE" OF THE DECEASED PARTNER'S SHARE IN THAT ESTATE AS TO VISIT LIABILITY FOR INCOME TAXES UPON THE DECEDENT PARTNER'S WIDOW AND EXONERATE THE SURVIVING PARTNER FROM TAXES WITH RESPECT TO THE SUMS DISBURSED TO THE WIDOW?

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

We are mindful that the moment to national jurisprudence of the question sought to be presented is ordinarily of greater importance than the intrinsic merits and equities

of the cause when this Court's discretionary writ of *certiorari* is invoked.

We therefore briefly note but strongly emphasize the following considerations:

Much of this nation's wealth is reposed in and the dynamics of the nation's economy is in large measure dependent upon the hundreds of thousands of partnerships, large and small, of the country. From the large brokerage, law, engineering and other firms of Wall and LaSalle Streets to the simple partnerships under whose auspices are conducted country stores, the incidence of the Federal income tax on the estates of deceased partners and surviving partners is of daily importance and concern.

The rule that where disbursements are made by surviving partners to representatives of deceased partners are (to the extent that they represent profits) taxable to the estates of deceased partners if they are "in liquidation" of the partnership's estate but are not so taxable if they are "in purchase" of the deceased partner's interest in that estate creates but does not greatly illumine a terrain of Federal income tax law in the broad field of partnerships.

We recognize that no single pronouncement of this Court can definitively resolve all questions that may arise under the myriad variations in covenants of partnership respecting the treatment of partners' assets upon the death or retirement of one of the partners.

But the Court of Appeals in the instant case sanctions the taxation of disbursement to the surviving partner as a "liquidation" in sustantial compliance with the partnership law, rather than in contractual disposition of assets in lieu of such a "liquidation", notwithstanding the vast differences between the rights which the law would give to

the petitioner and the surviving partner, respectively, in the absence of contract and the rights that the partners have generated for themselves under the instant contract.

The considerations heretofore briefly noted and developed in the Brief in Support of this Petition are sufficiently generic in their import to transcend the immediate context of facts in this case. A decision, as to whether income paid by a surviving partner who (1) accedes to the partnership property as sole owner, (2) is absolutely liable to pay a consideration measured by profits, and (3) must indemnify the decedent's estate for losses as a "liquidating" or "purchasing" partner, would be of great moment in the important domain of Federal income tax law as applied to the respective tax liabilities of surviving partners and decedent partners' estates.

With respect to the instant petitioner alone, the decision of the Court of Appeals will determine the incidence of Federal income taxes upon hundreds of thousands of dollars that will accrue to the petitioner in liquidation of the contracts extant at the date of her husband's death.

Moreover, if disbursements to the estate of the decedent do not result in the incidence of income taxes upon the estate, they measure the Federal Estate tax. Thus the problem is one of moment in the interrelation of Federal income and estate taxes

We submit that the holding of the Court of Appeals of the Eighth Circuit in the light of the considerations developed above and emphasized here as these Reasons Relied On For the Granting of the Writ should elicit this Court's writ of *certiorari.*

PRAYER FOR WRIT OF CERTIORARI.

WHEREFORE petitioner prays this Court's writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Eighth Circuit in this cause.

Respectfully submitted,

WILLIAM C. WINES,

Attorney for Petitioner.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

Opinions Below.

The opinion of the Court of Appeals is reported *sub nom.* in *Black* v. *Lockhart,* Collector, 209 Fed. (2) 308 and is reprinted in full as Appendix I, *post.* The trial court's opinion is printed in full in the transcript at pages 66-74.

The opinion of the Supreme Court of Missouri in *Veatch* v. *Black,* is reported in 363 Mo. 190, 250 S. W. 2d 501, and is reprinted in full as Appendix II, *post,* pp. viii to xxvii.

Reference to the Petition for Statement of the Basis of Jurisdiction and Statement of the Case.

The facts are stated in the Summary Statement of the Matter Involved in the Petition, *ante,* in sufficient substance to present the question that emerges from them.

Statement of the Question Presented.

The question presented, stated in the Petition, *ante,* and here repeated for the court's convenience, is:

> DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TERMS OF DISTRIBUTION CONTEMPLATED BY AND PERFORMED UNDER THE BLACK-VEATCH ARTICLES OF PARTNERSHIP SHOULD BE SO FAR ASSIMILATED TO THE "LIQUIDATION" OF THE ESTATE OF A PARTNERSHIP DISSOLVED BY DEATH AND SO FAR DISTINGUISHED FROM THE "PURCHASE" OF THE DECEASED PARTNER'S SHARE IN THAT ESTATE AS TO VISIT LIABILITY FOR INCOME TAXES UPON BLACK'S WIDOW AND EXONERATE VEATCH FROM TAXES WITH RESPECT TO THE SUMS DISBURSED TO THE WIDOW?

SUMMARY OF ARGUMENT.

The classical declaration of the principle of Federal income tax law exigent in this case is this Court's unanimous decision in *Bull* v. *United States,* (1944) 295 U. S. 247. In that case this Court said at page 254:

> "Where the effect of the contract is that the deceased partner's estate shall leave his interest in the business and the surviving partners shall acquire it by payments to the estate, the transaction is a sale, and payments made to the estate are for the account of the survivors. It results that the surviving partners are taxable upon firm profits and the estate is not."

In that case this Court held the income taxable to the surviving partners and not to the estate of the decedent. But it cited in support of the language above quoted *Hill* v. *Commissioner,* (C. C. A. 1st, 1930), 38 F. (2d) 165, and *Pope* v. *Commissioner* (C. C. A. 1st, 1930), 39 F. (2d) 420. *Bull* v. *U. S.,* 295 U. S. 247, and was followed in *Wilkins* v. *Commissioners* (C.C.A. 1st, 1947), 161 F. (2d) 830.

The question presented is whether the instant and similar cases are to be substantially assimilated to the *Bull* case or to the *Hill, Pope* and *Wilkins* cases.

The following features of the *Hill, Pope, Wilkins* and instant cases that distinguish those cases from the *Bull* case are sufficiently generic in their aspects to transcend the complex of facts in each case and to afford the basis for a general criterion of distinction which this Court should recognize and authoritatively declare as a capital principle in this field of the law:

In the *Bull* case, the decedent partner's estate was entitled only to a division of profits for the three years en-

suing upon the decedent partner's death, the survivors and successor partners not being personally liable for the amount accruing to the decedent partner's estate.

In the *Hill, Pope, Wilkins* and instant cases, the partners became the sole owners of the assets by virtue of the articles of partnership, assumed an absolute, personal and unlimited liability to pay a sum measured by profits accrued, and were free to engage the partnership assets in a new venture. In addition, in the instant case, petitioner has a "lien" in the nature of a "chattel mortgage" upon all of the assets of the new venture, superior to the rights of third parties dealing with the survivor, whereas in liquidation, her rights would be subject and inferior to the rights of new creditors. These and other features noted in the Statement of the Case and emphasized in the Argument, result in an essentially and fundamentally different economic relation from that contemplated by "liquidation" under the Uniform Partnership Act, which is in force in Missouri as well as throughout the Nation generally.

The decision of the Supreme Court of Missouri in *Veatch* v. *Black*, 363 Mo. 190, 205 S. W. (2d) 501, is not decisive of or relevant to the question here presented, which is one of Federal income tax law and does not depend upon the characterization of the contract by the State courts.

The question is of sufficient moment, not only to petitioner, but in the field of Federal Income and Estate Tax Law as applied to dissolved partnerships generally, to elicit *certiorari*.

ARGUMENT.

I.

The Court of Appeals erred in holding that the disbursements involved in this case were in "liquidation" of the partnership estate and not in "purchase" of petitioner's decedent's interest therein.

The classical authority recognizing that whether disbursements received by representatives of decedent partners by surviving partners result in a tax upon the representatives or survivors depends upon whether such disbursements are in "liquidation" or "purchase" of partnership assets is this court's unanimous decision in *Bull* v. *U. S.* (1944), 295 U. S. 247. Under the facts of that case, this court did indeed find the receipts taxable to the estate and not to the surviving partners. Nevertheless the court declared at page 254:

> "Where the effect of the contract is that the deceased partner's estate shall leave his interest in the business and the surviving partners shall acquire it by payments to the estate, the transaction is a sale, and payments made to the estate are for the account of the survivors. It results that the surviving partners are taxable upon firm profits and the estate is not."

The Court cited in the margin, with approval, *Hill* v. *Commissioner,* 38 F. (2d) 165 (C. C. A. 1st Circuit, 1930), and *Pope* v. *Commissioner,* 39 F. (2d) 420 (C. C. A. 1st Circuit, 1930), as authority for the rule announced in the language last quoted.

Therefore, at least so far as application for *certiorari* as distinct from adjudication upon the merits if *certiorari* be granted is concerned, the question is whether the facts

in this case are to be substantially assimilated to the *Bull* case decided by this court or to the *Hill* and *Pope* cases cited with approval by this court; for if, as we maintain, this case is within the ambit of the *Hill* and *Pope* cases, the opinion of the court of appeals in this case is in conflict with the decisions in those cases and should therefore evoke *certiorari.*

We therefore turn to a comparative analysis of the *Bull, Hill* and *Pope* cases before adverting to other authorities.

Bull v. U. S., 295 U. S. 247.

The facts in the *Bull* case are compendiously stated in the first two paragraphs of Mr. Justice Roberts' opinion:

> "Archibald H. Bull died February 13, 1920. He had been a member of a partnership engaged in the business of ship-brokers. The agreement of association provided that in the event a partner died the survivors should continue the business for one year subsequent to his death, and his estate should 'receive the same interests, or participate in the losses to the same extent,' as the deceased partner would, if living, 'based on the usual method of ascertaining what the said profits or losses would be . . . Or the estate of the deceased partners shall have the option of withdrawing his interest from the firm within thirty days after the probate of will . . . and all adjustments of profits or losses shall be made as of the date of such withdrawal.' The estate's representative did not exercise the option to withdraw in thirty days, and the business was conducted until December 31, 1920, as contemplated by the agreement.
>
> "The enterprise required no capital and none was ever invested by the partners. Bull's share of profits from January 1, 1920, to the date of his death, February 13, 1920, was $24,124.20; he had no other accumulated profits and no interest in any tangible property belonging to the firm. Profits accruing to the estate for the period from the decedent's death to the end of 1920 were $212,718.79; $200,117.90 being paid during

the year, and $12,601.70 during the first two months of 1921."

On these facts the court held that the disbursements by the surviving partners to the estate of the deceased partner were a liquidating distribution of profits and not the purchase price of the estate's interest in the partnership.

We shall defer for the moment noting of the factors that very significantly distinguish the *Bull* case from the instant case because those same features assimilate the intant case to the *Hill* and *Pope* cases, which cases we now address.

Hill v. Commissioner (C. C. A. 1st, 1930), 38 F. (2d) 165.

In the *Hill* case, cited above, the articles of partnership provided for the payment of "sums equal to the full amount of" [the decedent partner's] "net profits" for each of the three years ensuing upon his death. In this respect the *Hill* case resembles the *Bull* case and differs from the instant case only in that whereas the payments in the *Hill* case were to be for the deceased partner's profits only for three years following his death, the profits which measure the disbursements to petitioner are upon all contracts uncompleted at the time of petitioner's death.

But the *Hill* case *differs* from the *Bull* case and *resembles* the instant case in that in the *Hill* case, as in the instant case, while the amount of the disbursements was measured by profits earned by the survivors, *the survivors were bound absolutely to make such payments, and were personally liable therefor in the whole of their private fortunes,* whereas in a liquidation, the liability is a mere charge upon the assets.

That this distinction was regarded as crucial both by the Court of Appeals in the *Hill* case and the Supreme Court of the United States in citing that case as authority for the

general rule that distinguishes between "liquidations" and "sales" in the case of partnerships dissolved by death appears from the following important language in the *Hill* case addressed to the contention of the petitioners that "they, as surviving partners of the old firm, were obligated to pay a portion of the profits of the new firm to Soule's estate" and that therefore "such payments should not be held to be a part of the net income to the new firm distributable to them as income but a charge on its profits and as such deductible as an ordinary and necessary expense of the new firm in arriving at its net income . . . and the petitioner's distributive shares therein."

Rejecting this contention, the court said at page 168:

> "We do not think this contention can be sustained. To begin with petitioners were not obligated, under article XIV of the agreement of May 28, 1912, to pay a portion of the profits of the new firm to Soule's estate. By that article they agreed to pay to his estate 'sums equal to the full amount of the net profits' which he would have received had he lived and the business had gone on. This did not require that the payments which the petitioners were to make should be made out of the net profits of the new firm's business. Those payments could be made out of any funds which the petitioners chose to make them. The firm was not obligated by article XIV to pay these sums out of its profits or otherwise and it never became obligated to do so. This being so these payments to Soule's estate were not a charge upon the profits of the new firm's business and deductible as an ordinary and necessary expense of its business, if payments charged upon the profits of a business could be regarded as an ordinary and necessary expense within the meaning of section 214 (a) (1) of the Revenue Acts of 1918 and 1921. The mere fact that the petitioners, after having assumed the obligation contained in article XIV, elected to have it discharged out of the undistributed profits of the new firm did not create a charge upon those profits, nor diminish the

> petitioners' distributive shares therein. Section 218 (a) provides: 'There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.' If a partner by causing his personal obligation to be satisfied out of the profits of his firm could thus diminish his distributive share, the purpose of the statute would be set at naught, *Mitchel* v. *Bowers,* (C.C.A.) 15 F. (2d) 287."

Note that in the *Hill* case, as in the *Bull* case and in the instant case, the partnership was a service partnership in which capital assets were of little importance.

Judge Anderson's dissent merely emphasizes the need of authoritative clarification in this field.

Pope v. Commissioner (C. C. A. 1st, 1930), 39 F. (2d) 420.

In the *Pope* case, as in the *Hill, Bull,* and instant case, the firm was a service partnership. Its business was the sale and brokerage of fire insurance. It had no substantial fixed assets.

The articles of partnership in that case provided, as do the articles in all of the cases cited in this brief upon the question of "liquidation" *versus* "purchase" for Federal income tax purposes, for payments by the surviving partners to the estate of the decedent partner of sums measured by profits. *But the contract in the Pope case contemplated that the survivors could engage the partnership assets in a new partnership, whether composed of the survivors alone or of other persons.* In the instant case, the survivor is the sole owner of the assets of the former partnership and may engage them in a new venture if he chooses.

The Court of Appeals held that the disbursements were in "purchase" and not in "liquidation" of the deceased partner's interest.

Wilkins v. Commissioner of Internal Revenue (C. C. A. 1st, 1947), 161 F. (2d) 830.

This is a most interesting case and clearly recognizes that the distinction between distribution of profits in liquidation and remittances measured by profits as purchase price depends primarily upon (1) whether the surviving partners are absolutely bound, personally and individually, to pay the amount measured by the partnership earnings and (2) whether they are free to engage the partnership assets in continuation of the venture or are bound merely to administer them in liquidation.

Under the contract in the *Wilkins* case, the surviving and new partners were liable absolutely for a portion of the profits measured by earnings, whereas as to the balance they were merely to distribute them from the earnings when realized in liquidation of the assets. It was held that the payments for which the surviving and new partners were absolutely liable were payments in "purchase" of assets and other payments were in "liquidation." The former disbursements were not taxable to the estate and gave rise to no deductions for the surviving or successor partners. With respect to the latter disbursements the exact converse was held to be true.

In the court below both parties cited numerous decisions of the old Board and the present Court of Tax Appeals. We do not analyze all of these cases; for *certiorari* in this court is sought with a view to clarification of this field because of the diverse teachings of the United States Courts of Appeals in the field "liquidation" *versus* "purchase" for Federal income tax purposes.

In the instant case, as in the *Hill, Pope* and with respect to certain but not all of the disbursements, the *Wilkins* case, the following factors distinguish the *Bull* case:

In the *Bull* case, the deceased partner's estate was not only to participate in profits *but also in losses.* This is consistent with a continuing interest in the assets of the partnership as such. In the *Hill, Pope* and instant cases, not only were the assets of the deceased partners not to participate in losses occurring after their respective deaths, but the surviving partners were personally and individually liable for the amount measured by profits. One who assumes personal liability for an amount, whether immediately liquidated or ascertainable or measured by profits, and acquires the sole ownership of the assets is clearly a "purchaser" and not "liquidating partner." This is simply too plain for argument. In the instant case the character of "purchase" is even clearer; for the survivor must hold the decedent's estate harmless from all losses and liabilities.

In the instant case, the deceased partner is regarded as "in equity a vendor." This is not argument. It is the language of the articles of partnership. To be sure, it would not be controlling, if the substance of the agreement contradicted the characterization. But, as we are now engaged in demonstrating, the essence of the partnership covenants confirms this characterization.

In the instant case, the petitioner as decedent's personal representative has a "lien" which is in the "nature of a chattel mortgage." This is the interest of a vendor, not of a participant in the liquidation of a dissolved partnership.

The difference in economic realities is overwhelming. Third parties making new contracts with the survivor acquire a claim that is subject, junior and inferior to the "chattel mortagage" of the petitioner upon the assets that Veatch has purchased and now employs in a business con-

ducted as a sole proprietorship. Quite the contrary would be true of parties dealing with a liquidating partner. Their claims would be prior to those of the estate of the deceased partner.

II.

The Court of Appeals erred in relying upon the decision of the Supreme Court of Missouri in Veatch v. Black, 363 Mo. 190, 250 S. W. (2d) 501.

In *Heiner* v. *Mellon,* (1938) 304 U. S. 371, the United States Supreme Court said:

> "The state law creates legal interests, but the federal statute determines when and how they shall be taxed."

In *Lyeth* v. *Hoey,* (1938) 305 U. S. 188, this court held that while the state law defines the legal rights of the parties *inter sese,* the Federal law, not the state law, determines how those rights shall be characterized for Federal tax purposes.

Other cases to the same effect are *Morgan* v. *Commissioner,* (1940) 309 U. S. 78, *Putnam Estate* v. *Commissioner* (1945), 324 U. S. 393, and *U. S.* v. *Pelzer* (1941), 312 U. S. 399.

We submit that the decision of the Supreme Court of Missouri in *Veatch* v. *Black,* 363 Mo. 190, 250 S. W. (2d) 501, Appendix II, *post,* decides no question that is relevant to the question of Federal revenue law presented in this case.

III.

This case is of sufficient moment to elicit certiorari.

We have previously emphasized the great importance of the question whether disbursements by surviving partners to representatives of decedent partner are made in "liquidation" or "purchase" of partnership assets. That this field should be enlightened by authoritative decision of this court is almost self-evident.

It remains only to demonstrate that the decision of this case will afford such enlightenment if *certiorari* is granted and the merits are reached.

As to the cases of *Hill, Pope* and *Wilkins,* all considered under Point I, *ante,* it was demonstrated that in the First Circuit it is held that disbursements made by representatives of deceased partners are in "purchase" and not in "liquidation" of partnership assets even though the disbursements are measured by *post mortem* profits of the business where the surviving partners are personally liable for the amount of such disbursements and where the rights of the parties under the articles of partnership are substantially different from those that would be supplied by the ordinary law of partnership.

In this case, the surviving partner became the sole owner of the assets subject to a "lien" in the nature of a "chattel mortgage," is absolutely liable, not only for an amount equal to the deceased partner's share of the profits, but for any losses against whom he must hold the deceased partner's estate liable, and is under contractual obligation to the decedent's representative to perform all unperformed contracts for many years to come but conducts the business as a sole proprietor.

We submit that the decision for the Court of Appeals for the Eighth Circuit in this case is so far contrary to the *rationale* of the decision of the other cases cited as to be in conflict with those decisions. We have already distinguished it from the case of *Bull* v. *Commissioner*, 295 U. S. 247, relied on by respondent and the Court of Appeals below.

Mindful of the practical considerations exigent in application for this court's writ of *certiorari*, we suggest that the record in the case is short, the facts are simple and undisputed and the important question presented can be decided with little imposition upon the court's time.

If this case and the other cases are all to stand, the law in this important field is gravely unsettled in a very large and important region of Federal income tax law.

We have also briefly noted that if the accessions of petitioner and other representatives of decedent partners are not taxable as income, they measure an estate tax. So the case is important in the matter of interdependence of Federal income and Federal estate tax law.

Conclusion.

For the reasons suggested in the Petition and urged in this brief, we respectfully submit that this case should elicit *certiorari* and be reversed.

Respectfully submitted,

WILLIAM C. WINES,

Attorney for Petitioner.

APPENDIX. I.

Faye B. Black, Administratrix of the Estate of Ernest B. Black, Deceased, Appellant, vs. Harold A. Lockhart, Collector of Internal Revenue, Sixth District of Missouri, Appellee.	Appeal from the United States District Court for the Western District of Missouri. 209 Fed. (2d) 308.

[January 28, 1954.]

Before GARDNER, Chief Judge, and THOMAS and COLLET, Circuit Judges.

GARDENER, Chief Judge.

This appeal is from a judgment dismissing appellant's action by which she sought to recover judgment for taxes erroneously collected from her for the taxable year 1949. Appellant is the duly appointed, qualified and acting administratrix of the estate of her deceased husband, Ernest B. Black, while the appellee is the Collector of Internal Revenue for the Sixth District of Missouri. The parties will hereinafter be referred to as they were designated in the trial court.

Plaintiff's husband and N. T. Veatch, Jr., had for many years been associated together either as partners or as employer and employee. They were engineers and in the course of their concerted activities, on January 1, 1937, they entered into a written partnership agreement under which they continued to furnish professional engineering services to various public corporations, including political sub-

divisions and utility companies throughout the United States. On July 4, 1949, Ernest B. Black, plaintiff's intestate, died, necessitating a winding up of the partnership business. In 1949 plaintiff received in her representative capacity certain funds in the course of winding up the affairs of the partnership and the present controversy grows out of the contention on the part of the government that the funds so received were income to the estate of Ernest B. Black, deceased, whereas she contends that they were a part of the purchase price paid her by the surviving partner. The partnership employed the completed contract method of accounting by which all fees and the payment of all expenses incident to any particular job under any particular contract were accumulated until all the work under that particular contract and project had been completed, and all direct expenses, such as salaries, expenses of employees, etc., directly attributable to such job were chargd thereto at completion in order that the exact amount of profit might be ascertained at the completion of any contract.

The contract is a very lengthy one containing provisions relative to many contingencies. Paragraph VIII which seems to be of prime importance so far as the issues here involved are concerned provides as follows:

> "1. If either party shall die or be adjudicated bankrupt, or insolvent, or take proceedings for liquidation by arrangement or composition with his creditors, the partnership shall thereupon determine as to him, and he or his executors, administrators or assigns, as the case may be, shall have no interest in common with the surviving or other partner or partners in the property of the partnership, but shall be considered in equity as a vendor to the surviving partner for the share in the partnership of the deceased or bankrupt or liquidating or compounding partner as and from the date of his death, or bankruptcy, or insolvency, or of his having compounded as aforesaid, for the price and on the terms to be arrived at under the provisions hereinafter contained.
>
> "2. The method to be used in arriving at the amount due the retiring partner, or his administrators, executors, or assigns, shall be based upon the

value of that partner's interest as shown by the books of the partnership as of the effective date of the dissolution, with the following exceptions:

"(a) In figuring the value of the interest of said partner so retiring, the uncompleted contracts shall be handled by the following method:

"By carrying the contracts then held by the partnership to completion so as to arrive at the exact amount of the total fees, and the total direct charges on said contracts, and the consequent loss or profit to be derived therefrom. In determining the amount of the total fees and total direct charges on such contracts, there shall be charged to such contracts a fair proportion of the office overhead during the pernod of completion based upon the percentage of total office overhead incurred on both old and new contracts which the direct cost of old contracts bears to the direct cost of all contracts handled by the office subsequent to the effective date. There shall be included in the overhead the proportionate share of a monthly salary of the surviving partner not to exceed the last agreed to between the parties as a monthly drawing account.

"(b) Partnership insurance shall be taken into consideration as heretofore set forth.

"(c) All moneys received from charged off accounts, plan deposits forfeited, and other undisclosed assets, shall, when received, be divided equally between the parties.

"(d) Unsecured liabilities and losses on book accounts ascertained after the effective date to be deducted."

Paragraph IX in substance provides that upon retirement (the same would apply in case of death) of a partner, the books were to be closed in the manner provided in the contract and any new business undertaken by the surviving partner was to be recorded in a separate set of books as his individual business; each six months a written accounting was to be had and the surviving partner required to pay the amount as shown by the books of the company as due the retiring partner, less the sum of $2500.00, and the final accounting made of the entire interest of the retiring

partner within thirty days after the last contract uncompleted at the effective date shall be completed. There was paid to plaintiff by Veatch, the surviving partner, the sum of $214,068.13, representing one-half of the net income arising from the completion of the contracts subsequent to the death of Mr. Black. Plaintiff in her representative capacity filed an income tax return for the year 1949 showing no income. Upon audit the Collector of Internal Revenue determined that the above mentioned amount received by her as representing one-half of the net income arising from completing certain contracts subsequent to the death of Mr. Black constituted income of the decedent's estate and assessed the estate with an income tax of $21,577.38, including interest. Plaintiff paid the tax as so assessed and thereupon brought the present action to recover the amount so paid, contending that it had been erroneously assessed and collected.

Plaintiff contends here, as she did in the trial court, that the amount received by her from the surviving partner, N. T. Veatch, Jr., was not income for the year 1949 but was paid to her in her representative capacity as part of the purchase price of her deceased husband's share of the partnership property.

This contract has already been considered and construed by a number of courts. In the course of winding up the business of the partnership some differences in opinion arose between Mr. Veatch, the surviving partner, and Mrs. Black, the legal representative of her deceased husband, as to certain matters of accounting, and Mr. Veatch brought an action in the Circuit Court of Jackson County, Missouri, against Mrs. Black as Administratrix of her deceased husband's estate, seeking a declaratory judgment. It was there, as here, contended by Mrs. Black that the partnership agreement provided for a sale of the interest of the deceased partner to the surviving partner on the death of either of the parties. On trial the court in disposing of this contention said:

> "The partnership agreement dated January 1, 1937 provides for the liquidation of the partnership affairs upon the death of one partner and not for the sale of an interest in the partnership by the estate of the deceased partner to the survivor, and the sums paid and payable to defendant under such agreement are, in

fact, a distribution of income accruing from the performance of the contracts held by the partnership prior to the death of E. B. Black and do not represent payments by plaintiff as the purchase price of an interest in the partnership or of any other asset of property."

The case was appealed to the Supreme Court of Missouri where Mrs. Black renewed her contention that the partnership contract provided for a sale of the deceased partner's interest in the partnership property to the surviving partner. The Supreme Court, however, affirmed the decision of the trial court and in the course of its opinion touching this question said:

"What could the purchasing partner gain, if anything, under the uncompleted contracts provisions over a liquidation upon in good faith completing the uncompleted contracts and paying the retiring partner one-half of the earnings as if he continued a partner? We conclude, as did the trial court, the partners intended a distribution to the deceased partner's estate of earnings on partnership contracts completed after death the same as prior to dissolution and not a sale of earnings for a distributive share; but in either event the surviving partner under the agreement was to have an interest as owner only to his distributive share of the earnings on the uncompleted partnership contracts."

The State court action, it will be observed, was in effect between the parties to the contract, and as between the surviving partner and the legal representative of the deceased partner the decision of the Supreme Court became final and conclusive. In the instant case the trial court approved and followed the decision of the Supreme Court of Missouri, not on the theory of res judicata, but as a correct denunciation of the question presented and here involved.

Since the decision of the trial court in the instant case, the Tax Court of the United States has had occasion to construe this particular provision of the contract in a case entitled *Nathan Thomas Veatch, et al.* v. *Commissioner of Internal Revenue,* Docket No. 38567, in which the opinion was handed down November 30, 1953, ... T. C. .... That court, after quoting paragraphs VIII and IX of the contract, observed inter alia:

> "No capital was ever contributed to the partnership either by Black or by petitioner. The only accounts they had with the partnership represented their share of the profits, which were withdrawn, and sometimes overdrawn, from time to time. The partnership had no tangible assets other than furniture, fixtures and tools which were the equipment of the business. There was never any good will carried on the books and the partners did not consider that the partnership had any good will."

Referring to the contention that the contract provided for a sale of the interest of the deceased partner to the surviving partner rather than a dissolution of the partnership, the court said:

> "From the entire record we can only conclude that under the partnership agreement of Black & Veatch it was the partners' intention that the partnership be liquidated upon the death of one partner, and they did not intend a sale as determined by respondent. This was also the conclusion of the Supreme Court of Missouri and the trial court of that state when they construed the partnership agreement. The issues before the Missouri state courts did not involve any questions of tax liability, but merely required a determination of property rights stemming from the partnership agreement. The sum paid to the estate by petitioner was a distribution of partnership income accruing from the completion of contracts held by the partnership at the time of Black's death."

A somewhat similar situation was considered by the Tax court in *McAffee* v. *Commissioner,* 9 T. C. 720. In that case the court considered a contract for winding up the affairs of a law partnership. It was contended that the contract provided for a sale but the Tax Court held that the intention of the parties was to dissolve the partnership and that the payments received on dissolution were in fact income and not purchase price. In *Bull* v. *United States,* 295 U. S. 247, the Supreme Court considered a partnership agreement which among other things provided that in the event a partner died the survivors should continue the business for one year subsequent to his death and the estate should " 'receive the same interests, or participate in the

losses to the same extent,' as the deceased partner would, if living, 'based on the usual method of ascertaining what the said profits or losses would be. * * * Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will * * * and all adjustments of profits or losses shall be made as of the date of such withdrawal.'" It was claimed that the amount received from the partnership subsequent to the death of one of the partners was not income. Addressing itself to this contention, the court among other things said:

> "Here, however, the survivors have purchased nothing belonging to the decedent, who had made no investment in the business and owned no tangible property connected with it."

The decision of the trial court in the instant case is in accord with persuasive, if not controlling, precedents. Being of the view that the contentions of the plaintiff are without merit, the judgment appealed from is affirmed.

APPENDIX II.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

APRIL SESSION, 1952

N. T. Veatch,
Respondent-Appellant,
vs.
Faye B. Black, Administratrix of the Estate of Ernest Bateman Black, Deceased,
Appellant-Respondent,

No. 42,766*

363 Mo. 190, 250 S.W. (2d) 501.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
Honorable JOE W. MCQUEEN, Judge

These are cross appeals from a declaratory judgment construing certain provisions of the written agreement of partnership of Black and Veatch, Consulting Engineers, of Kansas City, Missouri, applicable upon the death of one of the partners. E. (Ernest) B. Black, a partner died on July 4, 1949. N. T. Veatch, also known as N. T. Veatch, Jr., the other partner, instituted the action against Faye B. Black (the widow of E. B. Black), Administratrix of the Estate of Ernest B. Black, Deceased. A main controversy is occasioned by the income tax law. The declaratory judgment of the trial court on the issues presented was, briefly stated, to the effect (1) that the agreement provided for a liquidation and not a sale of the retiring partner's intrest and an accounting which divided the earnings received on partnership contracts completed after Mr. Black's death equally between Mr. Black's estate and Mr. Veatch as a distribution of income (after general taxes but before income taxes) conformed to the agreement; (2) that charging bonuses paid to certain partnership key employees for services in completing the partnership contracts as an overhead expense of the partnership was proper; and (3) that certain contracts treated as new business of the surviving partner were under the agreement of the completion of partnership or old contracts and should be so treated. The amount involved vests jurisdiction here. On plaintiff's appeal the rulings with respect to "(3)," *supra*, are ques-

tioned; whereas, on defendant's appeal the rulings with respect to "(1)" and "(2)," *supra,* are questioned.

Plaintiff was first associated with Mr. Black as an employee in 1909. In 1915 they became partners under the name of Black and Veatch. In 1923 this partnership was dissolved, Mr. Black having encountered financial difficulties. Mr. Veatch continued the business as "Black and Veatch" with Mr. Black as an employee. Under a written agreement, dated January 1, 1937, the partnership of Black and Veatch was re-established and continued until the death of Mr. Black. The partners were men of high reputation in their profession. Black and Veatch performed professional engineering services, designing and supervising the construction of water supply, power and sewage systems, roads and pavements, airfields, et cetera. At Mr. Black's death the partnership had uncompleted contracts involving exceptionally large sums with corresponding fees (stated to be nonrecurring) to the firm.

Said partnership agreement of January 1, 1937, first reviewed the history of the Black and Veatch firm and stated the parties desired to renew the partnership. Then followed the "Now, Therefore," clause, reciting that "for One ($1.00) Dollar and other valuable considerations * * * N. T. Veatch, Jr., hereby sells and conveys to E. B. Black an undivided half interest in and to said business and property," describing the same (office furniture, fixtures, office and engineering equipment, instruments and supplies, accounts and bills receivable, pending contracts, other assets and choses in action), and that E. B. Black assumed one-half of all liabilities and obligations of the firm. The agreement then set forth provisions for the conduct of the partnership and restrictions on the partners for the protection of the partnership, for an accounting on January 1 of each year, oftener if necessary, and, in the event of the withdrawal or demise of either partner, "a complete audit of the business" by certified public accountants (paragraph II). It provided that neither partner was to "draw more money" from the partnership in any month than "due him for salary," determined by mutual agreement, and expenses incurred on behalf of the partnership (paragraph III); that income from all professional services of the partners belonged to the co-partnership (paragraph IV); and that life insurance be carried on the lives

of the partners and be distributed in a stated manner upon the death of a partner (paragraph (VI).

The paragraphs of the agreement important to the instant issues are VIII and IX, but other provisions bear thereon.

Paragraph VII of the agreement required a retiring partner to give the other an exclusive six months' option "to purchase the interest of the other partner on the basis and according to the terms hereinafter provided for in case of the death of one of the partners."

Other pertinent provisions of the agreement read:

> "VIII. 1. If either party shall die or be adjudicated bankrupt, or insolvent, or take proceedings for liquidation by arrangement or composition with his creditors, the partnership shall thereupon determine as to him, and he or his executors, administrators or assigns, as the case may be, shall have no interest in common with the surviving or other partner or partners in the property of the partnership, but shall be considered in equity as a vendor to the surviving partner, of the share in the partnership of the deceased or bankrupt or liquidating or compounding partner as and from the date of his death, or bankruptcy, or insolvency, or of his having compounded as aforesaid, for the price and on the terms to be arrived at under the provisions hereinafter contained.
>
> "2. The method to be used in arriving at the amount due the retiring partner, or his administrators, executors or assigns, shall be based upon the value of that partner's interest as shown by the books of the partnership as of the effective date of the dissolution, with the following exceptions:
>
> "(a) In figuring the value of the interest of said partner so retiring, the uncompleted contracts shall be handled by the following method: By carrying the contracts then held by the partnership to completion so as to arrive at the exact amount of the total fees, and the total direct charges on said contracts, and the consequent loss or profit to be derived therefrom. In determining the amount of the total fees and total direct charges on such contracts, there shall be charged

to such contracts a fair proportion of the office overhead during the period of completion based upon the percentage of total office overhead incurred on both old and new contracts which the direct cost of old contracts bears to the direct cost of all contracts handled by the office subsequent to the effective date. There shall be included in the overhead the proportionate share of a monthly salary of the surviving partner not to exceed the last agreed to between the parties as a monthly drawing account.

"(b) Partnership insurance shall be taken into consideration as heretofore set forth.

"(c) All moneys received from charged off accounts, plan deposits forfeited, and other undisclosed assets, shall, when received, be divided equally between the parties.

"(d) Unsecured liabilities and losses on book accounts ascertained after the effective date to be deducted.

"IX. 1. The amount so found to be due the partner retiring as set forth in this section, shall be payable to said partner, his executors, administrators or assigns, in the following manner, to-wit:

"(a) At the effective date of the retirement of one of the partners, the books shall be closed in the manner previously employed at the end of the calendar year, taking into account all assets and all liabilities at that date. Books of the partnership shall be continued intact until the assets have been realized, the liabilities paid, and the jobs in progress computed, as hereinbefore provided. Any new business undertaken by the surviving partner shall be recorded in a separate set of books as his individual venture.

"(b) Within three months after the effective date a statement of the accounts shall be rendered by the surviving partner, and there shall be paid by the surviving partner the amount shown on the books as of that date as due said partner, less the sum of $5,000.00. Thereafter, every six months, a written accounting shall be had, and the surviving partner shall pay the amount shown by the books of the company as due the

retiring partner, less the sum of $2,500.00. A final accounting and final payment shall be made of the entire interest of the retiring partner within thirty days after the last contract uncompleted at the effective date shall be completed.

"(c) If at any time the retiring partner shall, by the method above outlined, receive more than his interest as finally determined, his executors, administrators or assigns agree to repay such sum.

"(d) The retiring partner, his administrators, executors or assigns, shall have a lien on all of the assets belonging to the partnership at the effective date of dissolution. Such lien shall be in the nature of a chattel mortgage or pledge, and in case of default in the payments as in this contract provided, said lien may be foreclosed as a chattel mortgage.

"(e) In case of the death of the surviving partner prior to the payment in full of the retiring partner's interest then the entire balance due the retiring partner, irrespective of the other provisions of this contract shall sixty (60) days thereafter become due and payable. In that event, until the full purchase price is paid, the partnership business shall be operated under the joint control of the representatives of the two estates or their nominees. It is the wish of both parties hereto that the business which they have established be continued by their trusted employees, and that, if possible, some arrangement of that kind be worked out by their representatives.

"(f) The retiring partner, his administrators, executors, or their nominees, shall have the right to examine the books of the partnership and of the surviving partner at any time prior to the final payment for his interest.

"X. It is further understood that the surviving partner shall pay and discharge all the liabilities of the partnership, and shall hold the estate of the retired partner harmless from any liabilities thereon."

"XIII. In order to illustrate the application of the agreed method of determining the value of the retiring partner's interest herein provided for, there is ap-

pended hereto, made a part hereof, and marked 'Exhibit A,' a theoretical valuation based upon figures comparable to those contained in the firm statement as of December 31, 1936."

The "Exhibit A" attached to and a part of the agreement under paragraph XIII sets forth a balance sheet, showing assets and liabilities of the partnership as of December 31, 1936; and "Schedule 2" which reads:

"SCHEDULE 2.

"Liquidation of Black & Veatch.

	E. B. Black	N. T. Veatch, Jr.
"Net Worth, December 31, 1936.	$ 8,000.00	$10,000.00
Subsequent Adjustments—		
A. Adjust fixed assets	2,500.00	.....
B. Charge fixed assets to survivor	.....	17,500.00
Balance	$10,500.00	$ 7,400.00
D. Distribute $4,000.00	4,000.00	.....
Balance	$ 6,500.00	$ 7,400.00
F. Distribute $15,000.00—this is to be done as to make partners' accounts equal	14,450.00	550.00
Balance	$ 7,950.00	$ 7,950.00
K. Distribute operation profit (See below)	10,950.00	10,950.00
Balance	$ 3,000.00	$ 3,000.00
L. Final liquidation distribution	3,000.00	3,000.00

After Mr. Black's death the interested parties agreed that an audit should be made by Francis R. Brodie of Han-

sen, Brodie & Company, Certified Public Accountants, as of June 30, 1949, instead of July 4, 1949, the day of Mr. Black's death. The testimony was that the audit conformed to the accounting practice of the firm, covered the period from January 1, 1949 (the last prior audit), to June 30, 1949, and, among other things, showed there was due Mr. Black $10,777.35 and due Mr. Veatch $6,378.88. Mrs. Black was paid the $10,777.35 by check dated September 30, 1949.

On February 15, 1950, an audit covering from July 1, 1949, to December 31, 1949, of Black and Veatch by Mr. Brodie's firm was delivered to Mrs. Black. This disclosed, under the completed contract accounting practice of the firm, profits after general taxes but before income taxes of $413,400.53, and a check for $206,700.27 was tendered Mrs. Black. (Mr. Veatch did not withhold the $2,500 authorized under paragraph IX, 1(b)). Mrs. Black refused the tender because "bonuses" to key employees had been charged as an overhead operating expense. Under Mr. Brodie's instructions Social Security taxes and expenses incurred in attempting to procure new business not obtained were continued as an operating expense on the theory new business permitted holding the organization together and absorbed some of the overhead expenses. Mrs. Black later interposed objections to the two last mentioned items and Veatch tendered to her a check, dated August 1, 1950, for $218,456.53, adjusting said items, plus interest from April 1, 1950. This $218,456.53 payment was accepted without prejudice.

I. *The Sale or Liquidation Issue.* On this issue the trial court found that the true intent of the agreement was to provide for a liquidation of the partnership by completing the uncompleted partnership contracts and not to effect the sale of the deceased partner's interest; that the sums pavable to defendant were distributions of income accruing from the performance of said contracts; and that plaintiff had conducted the affairs of the partnership after Mr. Black's death as the surviving and liquidating partner, and not as sole owner.

Plaintiff contends the trial court was correct, and that defendant receives one-half of the partnership earnings (after proper expenses, including general taxes but

before income taxes) as if partnership income, the same as Mr. Black would have received it had he lived and continued to be a partner.

Defendant refers to this as the "income tax issue"; stating the amount of money which plaintiff owes defendant is the same whether the partnership agreement be one of purchase and sale or "the sums paid and payable * * * are * * * distribution of income" as determined by the trial court, and contends the Federal cases hold sums paid to the estates of deceased partners are not distribution of income unless (1) the estate of the deceased partner shared in the profits and losses on new business or (2) the estate of the deceased partner received only what had been already fully earned on the date of death.

Taking the agreement as a whole it is ambiguous as to the instant issue. We have examined the cases stressed by plaintiff[1] and by defendant,[2] and think we need not develop them as the construction of the contract depends on the intent of the parties and its language, a question of mixed law and fact. The trial court did not undertake to determine any tax issue, and our review is restricted to the issues presented here involving the construction of the agreement by the trial court.

Many expressions in the agreement are indicative of a sale. Upon the death of a partner the partnership "shall thereupon determine as to him," and his administrator "shall have no interest in common" with the survivor "in the property of the partnership," but "shall be considered in equity as a vendor" of his share to the other from the

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[1] *Gudeon* v. *Commissioner of Internal Revenue* (1935), 32 B. T. A. (U. S.) 100, 109, 110; *McAfee* v. *Comm. of Int. Rev.* (1947), 9 T. C. (U. S.) 720, 724, 726; *Bull* v. *United States* (1935), 295 U. S. 247, 256, 55 S. Ct. 695, 79 L. Ed. 1421; *Helvering* v. *Smith* (C. C. A. 2d, 1937), 90 F. 2d 590, 592 (5); *Doyle* v. *Comm. of Int. Rev.* (C. C. A. 4th, 1939), 102 F. 2d 86, 88 (1); *Hallowell* v. *Comm. of Int. Rev.* (1939), 39 B. T. A. (U. S.) 50, 55.

[2] *Hill* v. *Comm. of Int. Rev.* (C. C. A. 1st, 1930) 38 F. 2d 165 168(2); *Pope* v. *Comm. of Int. Rev.* (C. C. A. 1st, 1930), 39 F. 2d 420, 423 (3); *Bull* v. *United States* (1935), 295 U. S. 247, 254, 255, 55 S. Ct. 695, 79 L. Ed. 1421; *Benedict* v. *Price* (N. Y. D. C., 1929), 38 F. 2d 309, 312 (3, 5); *Edwards* v. *Comm. of Int. Rev.* (C. C. A. 10th, 1939), 102 F. 2d 757, 759 (5); *Nutter* v. *Comm. of Int. Rev.* (1942), 46 B. T. A. (U. S.) 35, 39; *Carter* v. *Comm. of Int. Rev.* (1937), 36 B. T. A. (U. S.) 60; *City Bank Farmers Trs. Co.* v. *Comm. of Int. Rev.* (1933), 29 B. T. A. (U. S.) 190; *Miller* v. *Comm. of Int. Rev.* (1938), 38 B. T. A. (U. S.) 487.

date of death "for the price and on the terms" thereafter set forth in the agreement (VIII, 1). In conformity with "in equity as a vendor," a lien is provided in paragraph IX, 1 (d). An adjudication of bankruptcy, insolvency, or proceedings for liquidation are placed on the same footing with the death of a partner (VIII, 1). The agreement next contemplates that the partnership books be closed, and the then "amount due" is based on the "value" of the deceased "partner's interest" as shown by the partnership books as of the date of death (VIII, 2; IX, 1 (a)), with payment thereof to be made within three months (IX, 1 (b)) but "with the following exceptions" (VIII, 2). The terms "value" (VIII, 2: VIII 2 (a); XIII) and "valuation" (XIII) appear in connection with the method outlined for determining the "amount due," and the terms "payment in full," "balance due," "purchase price" (IX, 1 (e)), and "purchase" (VII) appear.

A contract of doubtful meaning will be given a construction which will make it fair and reasonable between the parties and will not give one party an unfair advantage of another. *Mecartney* v. *Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131, 1134 (2). "Common sense and good faith are leading characteristics of all interpretations." *Paisley* v. *Lucas*, 346 Mo. 827, 143 S. W. 2d 262, 268 (5-7). Consideration is given to the contract as a whole and the fundamental rule for construing its language is to ascertain and give effect to the intention of the parties. *Paisley* v. *Lucas, supra; Larsen* v. *Crescent Planing Mill Co.*, Mo. App., 218 S. W. 2d 814, 819 (2). Greater regard is given the clear intention of the parties than the particular words used in attempting to express it. *Larsen* v. *Crescent P. M. Co., supra; Rickey* v. *New York Life Ins. Co.*, 229 Mo. App. 1226, 71 S. W. 2d 88, 93. The court considers the relationship of the parties, the subject matter of the contract, the usages of the business, the surrounding facts and circumstances leading up to and attending its execution, and the apparent purpose which the parties were undertaking to accomplish. *Paisley* v. *Lucas, supra; Larson* v. *Crescent P. M. Co.*, and cases cited. The interpretation of the contract by the parties, especially at the time of its execution, is an aid. *Paisley* v. *Lucas, supra; Smith* v. *Crane*, 169 Mo. App. 695, 154 S. W. 857, 859 (1).

As provided in paragraph VIII, 1, death causes a dissolution, a "determination," of a partnership, but the partnership has a kind of continued existence until its assets are collected and distributed to creditors or in accord with the partnership agreement. *Wilson* v. *Hoover,* 342 Mo. 1182, 119 S. W. 2d 768, 771 (1); *Schneider* v. *Newmark,* 359 Mo. 955, 224 S. W. 2d 968; 971 (3-6); 358, 300, RSMo 1949. A surviving partner succeeds to the rights of a deceased partner in the partnership assets for the purpose of winding up the partnership business. *Gross* v. *Aegerter,* 226 Mo. App. 128, 42 S. W. 2d 974, 978 (2-4); *Brinkop* v. *Brinkop,* Mo. App., 215 S. W. 2d 70, 77; 358.250 (4), RSMo 1949; 40 Am. Jur. 335, 296, 299. This is consistent with the provision that the administrator "have no interest in common" with the survivor "in the property of the partnership." Mr. Black and Mr. Veatch had been closely associated for over a quarter of a century in a highly technical engineering business and it was reasonable that each desired the other to wind up the partnership business and to be free from interference by the representatives of the other. The agreement does not state the deceased partner's estate is a vendor, but that it "shall be considered in equity as a vendor," giving rights in equity, but not at law, to receive money while withholding control; and then follows "for the price and on the terms to be arrived at under the provisions hereinafter contained" (VIII, 1), and the provision for a lien (IX, 1 (d)). The agreement does not characterize the survivor as a purchaser or vendee. The "Now, Therefore," clause of the agreement recited that "N. T. Veatch, Jr., hereby sells and conveys to E. B. Black an undivided half interest in and to" the business and property. This provided for a sale, purchase and conveyance; but the language in paragraph VIII, 1 differs, and evidences some difference in intent on the part of the partners.

The "amount due" as of the date of death is to be "based upon the value of that partner's interest as shown by the books," which "shall be closed" the same as at the end of a year (VIII, 2; IX, 1 (a)), "taking into account all assets and all liabilities at that date (IX, 1 (a)), which amount due is to be paid within three months (IX, 1 (b)); but there are exceptions thereto (VIII, 2). The partnership books are to be continued and separate books set up for the survivor's new business (IX, 1 (a)). This accounting of June 30, 1949,

under which plaintiff paid the defendant $10,777.35, is not here questioned. The instant issue involves the earnings on partnership contracts completed after Mr. Black's death up to the accounting of December 31, 1949.

The exceptions within the phrase "with the following exceptions" (VIII, 2) referred to several items, principally the uncompleted contracts. The completion of said contracts would extend over several years. The partnership books were kept on the "completed contract" basis—gains or losses on a particular contract were not determined, transferred or distributed until that contract was completed. "In figuring the value of the interest" of the retiring partner, the survivor was to carry the contracts to completion (VIII, 2 (a)). Surviving partners usually have an obligation to complete the executory contracts of a partnership. *Whitesell* v. *Pioneer Constr. Co.*, Mo. App., 2 S. W. 2d 147, 149 (4, 5); *Feucht* v. *Corbett*, 214 Ind. 103, 12 N. E. 2d 957, 959 (2, 4); 40 Am. Jur. 339, 301. The total fees and total direct charges were to be allocated to the particular contract, and overhead expenses were to be apportioned between the old and new, or Veatch, contracts. The provision for charging a proper share "of a monthly salary" (VIII, 2 (a)) (drawing allowance) to the surviving partner is not common to a contract of sale and purchase, but is proper to a liquidating partner. 358.180 (6), RSMo 1949; 40 Am. Jur. 348, 314. These provisions (VIII, 2 (a)) are for the stated purpose of arriving at the "consequent loss or profit" on the uncompleted contracts, and paragraph IX, 1 (c) provided that if the "retiring partner," by the method outlined, "receive more than his interest as finally determined" it was to be repaid. The deceased partner's estate shared in the losses and the profits on the uncompleted contracts.

The provisions for the equal division of moneys received from charged off accounts, plan deposits, forfeited, and other undisclosed assets (VIII, 2(c)), and the deduction of unsecured liabilities and losses on book accounts (VIII, 2 (d)) indicate a winding up of affairs and not a sale.

The provision in paragraph X that the survivor discharge all liabilities and hold the deceased partner's estate harmless would be usual where the survivor takes over all assets and assumes all liabilities. This paragraph is separate from the paragraphs covering the uncompleted contracts (VIII

and IX), which contemplate the determination of losses and profits on the uncompleted contracts (VIII, 2 (a)), and the retiring partner also agrees that any overpayment be repaid (IX, 1(e)).

Paragraph IX, 1(e) provides that "in case of" the survivor's death "prior to the payment in full of the retiring partner's interest, then the entire balance due" becomes payable in sixty days. The agreement, if a sale, contains no provision in any contingency for putting a price on the uncompleted contracts and its payment. Payment of the balance to eventually become due, involving losses and profits, is impossible of determination until all partnership contracts are completed, which might take several years. The surviving partner was authorized to withhold $2,500 under paragraph IX, 1 (b). An accounting upon the survivor's death could only determine the balance then due. Paragraph IX, 1(e) also provides for the return of the control of the partnership business after the death of the survivor to the estates of the two partners "until the full purchase price is paid." The words used indicate a sale; but, as stated, payment cannot be made until all contracts are completed, and the operation of the partnership business under joint control until the performance of the partnership contracts has characteristics of a partnership relation.

The partners, however, put a construction on the contract when they illustrated its application to the agreed method of determining the value of the retiring partner's interest in Exhibit A, made a part of the agreement in paragraph XIII. That exhibit first sets forth the "Assets and Liabilities;" and "Schedule 2" thereof, which is concerned with the uncompleted contract feature of the agreement, is headed "Liquidation of Black and Veatch." It refers to "Distributions"; "Distribute Operating Profit," and "Final Liquidation Distribution." It does not mention sale or price. The parties treated the earnings on uncompleted contracts as though they were distributing partnership income as in liquidation of the partnership.

Mrs. Reeve, an employee since 1916 and in charge of the general office and financial records, was present when the agreement was entered into and evidently typed its draft. She testified Mr. Black stated he wanted an agreement to continue the partnership until the uncompleted contracts,

in the event of Mr. Veatch's death, would be completed and the profits distributed as in the past, and in such a manner as not to have to go through the Probate Court; that the surviving partner was to liquidate all contracts that were in progress; that, when Mr. Veatch had been injured in an automobile accident, Mr. Black instructed her, should Mr. Veatch pass on, to continue the firm books and set up separate books for his work and he would continue until all firm contracts were completed, and that in his conversations at different times he made statements to like effect, and never used the words "buy" or "sell." Ray E. Lawrence, one of the key employees and a friend of Mr. Black, testified that Mr. Black told him that in the event of the death of either partner the surviving partner would liquidate all uncompleted contracts.

Paragraph VIII, 2(a) of the agreement speaks of loss or profit on the uncompleted contracts. Mr. Black and Mr. Veatch knew that partners were liable for Federal income taxes only in their individual capacities. 26 U. S. C. A. 181; 53 Stat. 69. A letter addresed to Mr. Veatch from Mr. Black on December 12, 1941, regarding the bonus payments for that year, recognizes that each would have to pay Federal taxes on his distributive share. Mr. Black knew, if the agreement were one under which the Federal income taxes had to be paid by the surviving partner, that the earnings would have to pay said taxes before there was a profit, the same as he had to pay Federal taxes on his distributive share before he had a profit. There are no real profits before the payment of taxes and other expenses of a business.

An exhibit based on the estimated earnings of Veatch continuing the partnership business and his new business for the years 1949, 1950, and 1951 shows assumed total earnings of $1,440, $290.72, of which $1,313,400.53 is allocated to partnership business, one-half being $656,700.27 and $126,-890.19 to Veatch business. Under plaintiff's theory of a distribution of earnings to the Black estate (as if Black had lived and continued a partner), Mr. and Mrs. Veatch, after payment of Federal income taxes, would have an estimated $257,324.43; and the Black estate, after Federal income taxes on the distributees' shares, would have an estimated $358,397.77. Under defendant's theory of a sale and purchase the Federal income taxes of Mr. and Mrs. Veatch on the $1,440,290.72 are estimated at $1,076,190.52 and with the

payment of $656,700.27 to defendant would result in Veatch sustaining a net loss of $292,600.07; and with the payment of Federal estate and State inheritance taxes chargeable to the beneficiaries of the Black estate, the beneficiaries would receive an estimated net of $538,054.27.

It taxes the credulity to believe that the partners, by use of words tending to indicate a sale in paragraphs VIII and IX and the provison of paragraph VII, giving an option to a non-retiring partner "to purchase the interest" of a partner withdrawing from the partnership on the basis provided for in case of death, intended results similar to those reached under defendant's construction of the agreement as applied to the uncompleted contracts. What could the purchasing partner gain, if anything, under the uncompleted contracts provisions over a liquidation upon in good faith completing the uncompleted contracts and paying the retiring partner-one-half of the earnings as if he continued a partner? We conclude, as did the trial court, the partners intended a distribution to the deceased partner's estate of earnings on partnership contracts completed after death the same as prior to dissolution and not a sale of earnings for a distributive share; but in either event the surviving partner under the agreement was to have an interest as owner only to his distributive share of the earnings on the uncompleted partnership contracts. This is in harmony with "Schedule 2," set forth herein, giving the partners' construction of the agreement, with Mr. Black's stated construction of the agreement, with the dealings between the partners, and with certain provisions of the agreement. The agreement separated the accountings for the uncompleted contracts and the accounting as of the date of dissolution. One may share in partnership income without being a partner. *London Assurance Corp.* v. *Drennen,* 116 U. S. 461, 471, 472, 6 S. Ct. 442, 29 L. Ed. 688; *Brown* v. *Commissioner of Internal Revenue,* 10 B. T. A. (U.S.) 1036, 1049.

Plaintiff may not have followed the letter of the agreement in every particular, but the records were kept in such manner that defendant's interests were ascertainable. We agree with the trial court that plaintiff's operation of the partnership business was a substantial compliance with and a recognition of defendant's interests under the agreement.

II. *The Bonus Issue.* Black and Veatch had established the practice of paying key personnel what was desig-

nated "bonuses," the amount paid to any given employee being agreed upon by the partners and paid in December after the result of the year's business could be forecast. In December, 1949, Veatch paid total bonuses of $223,510 to key employees. They were charged to overhead expenses and 88.9795% or $198,878.08 was allocated to the partners' account as cost of completing partnership contracts, and the balance, 11.0205%, was allocated to Veatch's business. Veatch in the accounting was charged with, paid, his half of the $198,878.08. This accounting was approved by the trial court. Mrs. Black protested the payment of bonuses and attacks the charge against her husband's estate. The amount paid was comparatively lower than in 1948, when Mr. Black was living, and its reasonableness is not challenged.

When Mr. Black died the partnership had 112 uncompleted contracts, involving millions of dollars of work and hundreds of thousands of dollars in fees. There were 450 employees at the time of trial. Many key employees, "sponsors," performed the same type of duties as the partners; procured contracts for the firm and carried them through to completion, conferring at times with the partners. They were competent engineers, capable of earning a high rate of compensation from employers or in the private practice of their profession. The salaries paid the younger employees were reasonable, but salaries paid the key employees, without the bonuses, were inadequate. No employe, outside of those on Government work, received over $6,000 a year. Out of the sixty-odd receiving a bonus in 1949, only five received a salary in excess of $6,000 and the salary of the greater number was less than $6,000. Bonuses were paid to keep the organization intact, and were necessary to the operation of the business as a going concern. In arriving at the bonus for a given employee the partners would discuss and consider the result of the year's business, the contribution made thereto by the employee, his business dealings, his length of service, the salary paid him, and a fair compensation for his work for the year. The salary was then deducted from what was arrived at as a fair compensation and the difference constituted the bonus payment.

The organization had paid bonuses, with the exception of the depression years of the 1930s, since 1919. Mr. Black was instrumental in inaugurating the system and active in

its administration. He had informed top engineers when employed that they would receive a salary and a bonus when earnings justified it. He made application, under oath, during World War II to the Salary Stabilization Unit of the United States Treasury Department for and secured approval to pay bonuses, stating this had been the practice of the organization for twenty-five years.

The partnership agreement provided for the control and operation of the business in the surviving partner (VIII, 1) and the charging of the overhead costs against the partnership after its allocation between old and new business (VIII, 2 (a)). It is not fairly conceivable that either partner intended the completion of the partnership business without continuing the settled policy of paying bonuses that reasonable compensation be paid the employees. The survivor might have established reasonable salaries. The reasonableness of the amount paid is not in issue. Defendant's cases of *Crowell* v. *Houde Eng. Corp.*, Mo. App., 19 S. W. 2d 516, 518 (2, 3), and *Hubbard* v. *Turner Department Store Co.*, 220 Mo. App. 95, 78 S. W. 1060, 1061 (3), where employees sued to compel the payment of bonuses, do not control the instant issue involving a good faith compliance with sound business principles and a settled understanding between the partners. *Wm. S. Gray & Co.* v. *United States*, 35 F. 2d 968, 974. The decree of the trial court on the issue is sustained.

III. *The Controversies Involving Four Contracts.* In May, 1949, Black and Veatch started assigning a number to a project when a file was opened. The project numbers had reached 1766 at the time of Mr. Black's death, and projects numbered 1767 and above were supposed to be new or Veatch business. The trial court found that No. 1783, Blair, Nebraska; No. 1808, Chanute, Kansas; No. 1810, Ottawa, Kansas; and No. 1867, Memphis, Tennessee, should be classified as old business or as parts of old contracts. Veatch appeals from the decree on "these four small contracts." None was completed in 1949 and, consequently, the accounting hereinabove discussed does not reflect the loss or profit on them.

From the record and the exhibits the court could find that Black and Veatch's offer to perform certain services for Blair, Nebraska, for $1,000 "top fee" was accepted by

the City in a letter dated June 9, 1949, which letter was given project No. 1763. Thereafter, a formal contract was executed, bearing date of August 12, 1949, and provided for a fee not to exceed $1,000. This contract was given a new number—No. 1783—as new business. Mr. Veatch identified an exhibit as a list of contracts on hand at Mr. Black's death which he proposed to pursue to completion, and among the number is Blair, Nebraska, contract dated "8-12-49."

On December 18, 1945, the City of Chanute, Kansas, entered into a contract with Black and Veatch for certain engineering services described in Sec. I, paragraphs A to H, inclusive, agreeing to pay therefor as provided in Sec. II, paragraphs A to C, inclusive, of the contract. This contract was project No. 1647, and appears as an uncompleted contract on the exhibit listing the contracts uncompleted at Mr. Black's death and also in the accounting as of June 30, 1949, as an uncompleted "power plant improvements" contract. A letter of October 20, 1949, refers to project No. 1647, stating Black and Veatch was willing to extend the contract of December 18, 1945, to include the proposed boiler installations, but would be forced to revise the wage scale for the resident engineer outlined in Sec. II, C, of the contract, raising it to $600 from the $450 a month provided for in the contract, and that the contract need not be further charged as the boiler was definitely a unit recommended in the report covered by this contract. The proposed modification of the contract was accepted by the city in a letter dated October 25, 1949, stating also "otherwise the contract is to be in full force and effect." Although this letter was given project No. 1808, as though new business, it appears to be a part of project No. 1647 and old, or partnership, business.

The Memphis, Tennessee, contract is dated September 23, 1948, and carried project No. 1713. It is lengthy, and the parties evidently contemplated the work would take some time to complete, perhaps several years. Its subject matter is an adequate water supply and distribution to meet the water requirements, including fire protection, of the City in ten year periods from 1950 through 1980. Black and Veatch, among other things, were to prepare detailed construction plans, specifications, et cetera, for all construction work and equipment necessary for the construct-

ing and equipping of a complete "water treatment plant, storage reservoirs and pumping station of proper and adequate size * * *," and, among other things, were also to supervise all construction and do all necessary tasks to obtain strict compliance with the construction contracts, plans, specifications, et cetera. The contract set out the schedule of fees to be paid Black and Veatch. After Mr. Black's death project No. 1867 was opened as Veatch business. As we read the exhibits and record, project No. 1867 relates to a new pumping station, stated, in what we understand is a resolution adopted by the City officials, to be "in accordance with the terms and conditions of the contract for engineering services executed September 23, 1948." While Sec. G of the contract of September 23, 1948, excludes three or four specified items which the City officials contemplated designing and constructing, with the privilege to extend the contract to embrace such items, if desired, at a fee for such services as shall be mutually agreed upon, the record does not establish that project No. 1867 is within the items excepted from said original contract of September 23, 1948. Mrs. Reeve, in charge of the records and files of Black and Veatch and of Mr. Veatch, testified she knew of no contract with the City of Memphis other than the contract of September 23, 1948, and in the accounting for the period ended December 31, 1949, total direct charges of $23,066.03 are made against project No. 1713, said Memphis contract, as an uncompleted partnership contract. There are no billings credited in the accounting. The trial court's holding is not established to be erroneous.

On April 10, 1946, the City of Ottawa, Kansas, and Black and Veatch entered into a contract for the partnership to furnish engineering services for the "proposed installation of an additional sludge digestion tank at the City Sewage Disposal Plant," including the plans, specifications, supervision of construction, et cetera, thereof, for the consideration stated in the contract. The contract was designated "Ottawa, Kans., Sewage Disposal." On September 15, 1948, a contract reciting it supplemented the contract of April 10, 1946, was executed, Black and Veatch agreeing to furnish such additional engineering services as requested by the City in connection with the "City sewer system or Sewage Disposal Plant or such other works as mutually agreed

upon." Some testimony indicates the 1948 contract was designated "Project 1723, sewer and sewage disposal, 1948." The record does not establish the occasion for the 1948 contract but Veatch states the sludge digester was never constructed. Negotiations between the City and Veatch, doing business as "Black and Veatch," were renewed in October, 1949, a letter from Black and Veatch stating the writer was informed the City was ready to proceed with the work covered in the contract dated April 10, 1946, and suggesting improvements other than that mentioned in the 1946 contract should probably be made. The City, on October 27, 1949, authorized Black and Veatch to proceed with a study of the entire plant that proper improvements be made; and, under date of April 12, 1950, referring to Black and Veatch's recommended improvements to the "Sewage Disposal Works of the City," authorized Black and Veatch "to proceed with the preparation of Plans and Specifications and Contract Documents providing for improvement of the Sewage Disposal Works in line with the recommendations set forth in your report" filed February 20, 1950. On April 14, 1950, Black and Veatch acknowledged receipt of this letter, stating: "We are proceeding with this work in accordance with your authorization under the terms of our contract dated April 10, 1946, as amended September 15, 1948." Letters in the file carry Nos. 1810 and 1869. The parties considered the "supplemental" contract of September 15, 1948, to contemplate work in the future on a "sewer system or sewage disposal plant" for the City although the purported contract at the time of its execution imposed no obligation with respect thereto. Mr. Black was living when the contracts of April 10, 1946, and September 15, 1948, were executed. When the City and Veatch agreed upon the improvements to be made for the sewage disposal of the City, Veatch treated and recognized the agreed upon improvements as implementing and being under the contract of April 10, 1946, as supplemented by that of September 15, 1948. It appears that this was Black and Veatch's method of conducting business. It is the interpretation Veatch placed upon it, and, in the circumstances, we think error is not established in the trial court's ruling to like effect as to the understanding between the partners.

We conclude the trial court reached the correct result on the controverted issues presented for review and the decree and judgment should be affirmed. It is so ordered.

WALTER H. BOHLING,
Commissioner.

Per Curiam: The foregoing opinion by Bohling, C., is adopted as the opinion of the court. *All concur.*

WESTHUES, C. *Concurs.*
BARRETT, C. *Concurs.*